ESHAH BINTI SA'AT v. MERIAM BINTI SA'AT & ORS.

[O.C.J. (Abdul Razak J.) January 20, 1975]
[Kota Bharu — Civil Suit No. 25 of 1971]

Practice and Procedure — Application to be substituted for defendant as owner of land — Order of Collector not appealed against or quashed — Application to amend writ to include order for declaration — Abuse of process of court — R.S.C. 1957, O.25 r.4.

Administrative law — Declaration — Whether can be used to quash decision of tribunal.

In this case the Collector of Land Revenue had in a distribution suit in respect of the estate of Minah binte Mat Diah under the Small Estate (Distribution) Act, 1955, ordered that the defendant be registered as the proprietor of certain lands. The plaintiff subsequently applied to the High Court for an order that her name be registered as the lawful owner of a half share in respect of the said lands. At the trial, the plaintiff applied to amend the writ to pray for a declaration that she was entitled to the lands in question. She had not appealed nor sought to quash the order of the Collector.

Held: the application for an amendment should be refused as the plaintiff's action in seeking a declaration although her remedy lay elsewhere was an abuse of the process of the court in terms of Order 25 rule 4 of the Rules of the Supreme Court and therefore the action should be struck out with liberty to file a fresh action.

Cases referred to:-

(1) *Ponnusamy* v. *Nathu Ram* [1959] M.L.J. 228.
(2) *Punton* v. *Ministry of Pensions and National Insurance* [1963] 1 W.L.R. 1176; [1964] 1 W.L.R. 226.
(3) *Marchioness of Huntly* v. *Gaskell* [1905] 2 Ch. 656.

CIVIL SUIT.

A. Gomez for the plaintiff.

Defendant unrepresented.

Abdul Razak J.: In this action the plaintiff prays for:

"An Order that the Register of Titles in respect of Lot No. 157, 45, 2134, 2135 and 77 in the localities specified therein be rectified and that her name be registered therein as the lawful owner of a half share in respect of each of the said Lots."

The plaintiff was represented by Mr. Gomez. The defendant was unrepresented. At the outset, I made an Order that the action be struck out with liberty to file afresh for reasons which I shall now set out.

The action arose out of a distribution made by the Collector in a distribution suit on the April 19, 1969 in respect of the estate of the deceased Minah binti Mat Diah under the Small Estate (Distribution) Act 1955 wherein the defendant was registered as the proprietor of the land hereinbefore mentioned.

The plaintiff and the defendant were daughters of the deceased Minah binti Mat Diah. The plaintiff said that she was entitled to a half share of the said lands. The defendant said the plaintiff had sold the lands to her at $800. She denied that the plaintiff was entitled to a half share but only to 2/8 share since the deceased had a son named Ahmad bin Mat Diah, since deceased. The said Ahmad bin Mat Diah would, according to the plaintiff, be entitled to 4/8 share. The defendant said the said Ahmad bin Mat Diah had relinquished his claim in her favour and she produced a letter from him (in the bundle) to that effect addressed to the Collector. The defendant was nevertheless prepared to settle the dispute with her sister, the plaintiff, to avoid a court action by transferring to her Lot No. 77 and 45 (a half share).

The plaintiff said that she was not present at the hearing of the suit. The defendant admitted that the plaintiff was in Siam at the time of the hearing. The plaintiff had nevertheless not filed an appeal earlier against the Collector's decision which she was entitled to do under section 29 of the said Act. Neither had she applied for an extension of time to file an appeal. She had not given any reason why she had not done so, nor had she filed an action under section 17 for the Collector to make a fresh finding. She had not applied for an Order of *certiorari* to quash the finding of the Collector for lack or excess of jurisdiction or acting contrary to the rules of natural justice. She had nevertheless come to court to ask for an Order that she be substituted for the defendant as the owner of the land, the subject of her claim.

I have to say, with respect, that I have no jurisdiction to embark on such a journey. The Collector had made a decision on the facts which was final and conclusive as he was statutorily empowered to do until he was reversed on appeal or until it was subject to review by a declaration or by way of the prerogative writs. At the outset, the plaintiff sought to amend the writ to clothe me with the necessary jurisdiction, to pray instead for a declaration that she was entitled to the land in question. But the precise term of her amendment was not extended to me nor was it clear.

It has been held that in dealing with the application for amendment, the court has to consider the materiality and effectiveness of the amendment and that it was a well established practice not to allow an amendment where it appeared such an amendment would be useless. The court should look at the probable consequence of the amendment and if the amendment would be ineffectual then it ought not to be allowed to be made. One such amendment was sought to be made in *Ponnusamy* v. *Nathu Ram*[1] and was refused. Clearly, the amendment here, even if allowed, would be of no value because I would not have been persuaded to grant the declaration asked for. To have the desired effect, the Collector's decision must at least be impugned. An amendment would, therefore, have involved making the Collector a necessary party to the action with or without the defendant. To allow the application to amend at the trial stage, therefore, was to make the Collector a party and binding him without first giving him the right of reply.

There are a number of factors which in practice the court normally takes into consideration in exercising its discretion. It is usual not to grant a declaration where there are alternative remedies available and adequate and had not been exhausted unless difficult and doubtful questions of law are involved. It is the practice for the court not to interfere where the statute has prescribed a mode of procedure for the parties to seek redress. The court would not make a futile declaration. A declaration would have no effect on the Collector's award because it does not quash. Only *certiorari* quashes. A declaration can go no further than to state that the impugned order is invalid. Until it is so quashed the order or the award remains binding.

There has also been a considerable delay in asking for the declaration. No doubt time unlike in *certiorari*

is no bar to a declaration. But undue laches should be a bar to a declaration, otherwise we will have seen the last of the remedy of *certiorari*. There has been a lapse of two years since the Collector made his award before the plaintiff made the application for a declaration to impugn it.

The position which certiorari and declaration play and has played in the supervision of inferior tribunals had been the subject of constant discussion in the past in numerous decided cases. I would endeavour to consider only one (both at the trial and on appeal) if not for any other reason but because of the eminence of the counsels who argued them and naturally in the somewhat lucid and comprehensive manner in which the trial and appeal judges dealt with the principles involved. In *Punton* v. *Ministry of Pensions and National Insurance*,[2] the facts and the statute are not admittedly identical with the case here but the principle is basically the same. It arose out of a claim under the statute for benefits given to unemployed persons specified therein. It stipulates that a right to the claim must be in accordance with the procedure the statute so provides. Disputed claims are heard by the National Insurance Commissioner. He held that the plaintiff was not entitled to the benefit claimed. An action was consequently brought by him for a declaration wheher the Commissioner had come to a correct determination in law in making the award which he did. The Court of Appeal hold that it would not disturb the trial judge for finding that although it had jurisdiction it would not exercise its discretion to make a declaration. The court went further to say that the award of the National Insurance Commissioner could not be quashed by a declaration and there was no power to replace it (at page 234 — 1964). It would not make a declaration because to do so would be making a decision contrary to the one made by a tribunal following a prescribed statutory procedure and which is still effective. Lord Justice Sellers went on to say (at page 236):

"It is true that the Court of Queen's Bench has an inherent jurisdiction to control inferior tribunals in a supervisory capacity and to do so by certiorari (which would be the relevant procedure in this case), which enables the court to quash the decision if the inferior court can be shown to have exceeded its jurisdiction or to have erred in law. Neither certiorari nor mandamus usurp the function of a tribunal but require it, having quashed its decision, to hear the case and determine it correctly.

There may be many cases where a summons for a declaration is at least an adequate substitute for certiorari proceedings and where it may have advantages over it with no defects. That would be so where an authoritative statement of the law by the High Court will serve to undermine a decision or order so that it need not be complied with and could not in the light of the pronouncement of the law be successfully enforced.... Without employing the methods set out in the Act, that is. without obtaining an award, the plaintiffs cannot enforce the statutory right to unemployment benefit they claim....

Apart from certiorari there is no machinery for getting rid of the decision of the National Insurance Commissioner and, what is more important, no way of substituting an effective award on which the claims could be paid. It would be out of harmony with all authority to have two contrary decisions between the same parties on the same issues obtained by different procedures, as it were, on parallel courses which never met or could meet and where the effective decision would remain with the inferior tribunal and not that of the High Court."

Thus said it leaves me only to stress that a declaration is only as good a substitute for certiorari where it seeks in the words of Lord Justice Sellers just mentioned "to undermine a decision or order so that it need not be complied with and could not in the light of the pronouncement of the law be successfully enforced". Clearly, those conditions would not work to dislodge and quash the Collector's order by a declaration because the order has already been made and complied with; namely, the land has already been registered in the name of the defendant. And it follows that in so far as enforcing the order is concerned the question hardly arises.

In my respectful view, the plaintiff's action in seeking a declaration before the court although her remedy lies elsewhere is an abuse of the process of the court in terms of O.25 r.4. *In Marchioness of Huntly* v. *Gaskell*,[3] the court struck out the whole indorsements on the writ as being an abuse of the process of the court although the defendants had applied to strike out certain portions only; but without prejudice to the plaintiff's issuing a new writ claiming relief in proper form. In the action plaintiff sought to pray for a declaration that she was entitled to the real and personal estate of the deceased under Scotch law. Under Scotch law, however, she was only entitled to the personal not the real estate. An order was, therefore, made to strike out the whole of the pleading (although an amendment could have been made to strike out to the extent of the real estate only) with liberty to her to file a fresh suit limited to her right to claim the personal estate. A leaf may be taken from this decision because whereas there the abuse, in so far as it claimed the real estate, was partial only; here the abuse, in so far as the action is unsustainable, is entire. Consequently, the question of striking out the writ with liberty to file afresh strictly does not arise in the instant case. There was nothing else left, therefore, for me to do except to dismiss the claim. However, I was minded of section 17 of the Act and, as stated earlier, the plaintiff's remedy really lies there by asking the Collector to review the dispute. There is no time limited by the statute for an application made under it and my construction of the section is that it is wide enough to enable the Collector to vary his order if need be.

In the premises it was felt that it would only be doing substantial justice to the plaintiff if the order in terms of the one given was made.

Order accordingly.

Solicitors: *Mohamed Yaacob & Gomez.*